# No. 12,747

# United States Court of Appeals

## For the Ninth Circuit

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J. R. Norberg, an individual doing business as Norberg Adjustment Bureau; Hope D. Pettey, William B. Dolph, Alice Huston Lewis, Helen S. Mark, Elizabeth N. Bingham, D. Worth Clark, Edwin P. Franklin, Glenna G. Dolph, individually and doing business as copartners under the firm name and style of KJBS Broadcasters,

*Appellants,*

vs.

Paul W. Ryan, Trustee of the Estate of Brick O'Gold (a corporation),

*Appellee.*

**Appeal from a Judgment of the United States District Court for the Northern District of California, dated August 9, 1950 and filed August 9, 1950.**

## BRIEF FOR APPELLEE.

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J. R. NORBERG, an individual doing business as Norberg Adjustment Bureau; HOPE D. PETTEY, WILLIAM B. DOLPH, ALICE HUSTON LEWIS, HELEN S. MARK, ELIZABETH N. BINGHAM, D. WORTH CLARK, EDWIN P. FRANKLIN, GLENNA G. DOLPH, individually and doing business as copartners under the firm name and style of KJBS Broadcasters,

*Appellants,*

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Appeal from a Judgment of the United States District Court for the Northern District of California, dated August 9, 1950 and filed August 9, 1950.

## BRIEF FOR APPELLEE.

## STATEMENT OF JURISDICTION.

The appellee's predecessor filed a complaint, in the Southern Division of the United States District Court for the Northern District of California, against appellants, to recover a preference. (T. 3-7.) Each of the appellants appeared and answered to the merits. (T. 8-9.) Following the trial, findings of fact, conclusions of law, and judgment after trial by the Court were made and entered by the trial judge. (T. 9-15.) Notice of appeal therefrom to this Court was filed by appellants on September 7, 1950. (T. 16.) Jurisdiction of this Court upon appeal to review the said judgment of the District Court is therefore sustained by Section 24, subdivisions a and b, of the Bankruptcy Act. (11 U.S.C.A., Sec. 47, subds. a and b.)

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## STATEMENT OF THE CASE.

The appellee is the substituted trustee for Harry F. Meilink, deceased (T. 215-216), of the estate of Brick O'Gold, a corporation, against which an involuntary petition in bankruptcy was filed on November 9, 1949, and said corporation was adjudged bankrupt on November 28, 1949. (T. 4.)

On May 24, 1950, the trustee filed a plenary action to recover from the appellants a preference (T. 3-7), alleging that appellant, J. R. Norberg, an individual doing business as Norberg Adjustment Bureau, on an assigned claim from the remaining appellants, a copartnership, filed a suit on or about September 12,

1949, in the Municipal Court of the City and County of San Francisco, State of California, to recover a claim due to the assignor from the bankrupt; a writ of attachment was issued and levied on the property of bankrupt on September 13, 1949 and thereafter, upon procurement of a judgment against bankrupt, a writ of execution was issued and levied on bankrupt's property as a result of which appellants on October 5, 1949 came into the possession of $1076.40. (T. 3-7.) The answer, by failure to deny, admits the filing of the involuntary petition against bankrupt on November 9, 1949 and subsequent adjudication; and the appointment and qualification of the predecessor appellee as trustee of bankrupt's estate. The answer denies other allegations of the complaint, but admits the filing of the suit on or about September 12, 1949, the levying of a number of attachments on debtors of the bankrupt, and alleges the procurement of a judgment, and on execution appellant, J. R. Norberg, obtained $1076.40 on October 5, 1949. (T. 8-9.)

The action was tried on the two issues, (a) the insolvency of the bankrupt at the time of the attachment, and (b) knowledge or reasonable cause to believe bankrupt was insolvent at that time. (T. 20.)

Comment is necessary on the form of appellants' brief. It contains no specification of error, with respect to the admission into evidence of bankrupt's schedules, as required by Rule 20, subdivision 2(d) and (f) of this Court, nor is urged error on this point particularly set out (App. Op. Bf. 7 and 17), although

litigants and their counsel have been admonished the said Rule 20 must be strictly observed. (*McClyman, et al. v. Hamilton,* 9 Cir., 1950, 180 F. (2d) 965, 967; *Hemphill Schools v. Commissioner of Internal Revenue,* 9 Cir., 1943, 137 F. (2d) 961, 963; *Chapman Bros. Co. v. Security-First National Bank,* 9 Cir., 1940, 111 F. (2d) 86, 87; *Sampsell v. Anches,* 9 Cir., 1940, 108 F. (2d) 945, 948; *Century Indemnity Co. v. Nelson,* 9 Cir., 1937, 90 F. (2d) 644, 651; *Muyres v. United States,* 9 Cir., 1937, 89 F. (2d) 783.)

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## ARGUMENT OF THE CASE.

**Summary of argument.**

1. The evidence in the record is sufficient to support the findings and judgment of the trial Court. It satisfies the only two elements which were in dispute and upon which the trial proceeded and was concluded, for it establishes (a) a transfer of property of the debtor to the appellant creditors while the debtor was insolvent, (b) made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

2. The contention that the judgment fixed the value of bankrupt's assets at the time of adjudication instead of the time of the preference is without merit.

3. The substantial rights of appellants were not affected by the introduction of the bankruptcy schedules. Appellants have not affirmatively shown error,

in that the record discloses appellants did not object to the trial Court considering the bankrupt's schedules.

4. The judgment of the trial Court was sound in law and sound in fact and therefore should be affirmed by this Court.

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1. **THE EVIDENCE IN THE RECORD IS SUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE TRIAL COURT.**

Rule 52, subdivision (a), of the Federal Rules of Civil Procedure (28 U.S.C.A. fol. Sec. 723c) provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

In *Wittmayer v. United States,* 9 Cir., 1941, 118 F. (2d) 808, it was said, at page 811:

> "The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. Silver King Coalition Mines Co. v. Silver King C. M. Co., 8 Cir., 204 F. 166, 177.
>
> The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S.C.A. following section 723c), is but the formulation of a rule long recognized and ap-

plied by courts of equity. Guilford Const. Co. v. Biggs, 4 Cir., 102 F. (2d) 46, 47.

As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S.Ct. 169, 170, 61 L.Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

In *Grace Bros., Inc. v. Commissioner of Internal Revenue,* 9 Cir., 1949, 173 F. (2d) 170, it was said at page 173:

"In the application of this rule and of the equity rule, which prior to the adopting of the Federal Rules of Civil Procedure governed review of equity cases only and which the rules made of universal application in all civil cases, United States v. United States Gypsum Company, 1948, 333 U.S. 364, 394, 68 S.Ct. 525, reviewing courts have emphasized the importance of the conclusions of the trial judge which derive from his opportunity to pass upon the credibility of witnesses their own way. Davis v. Schwartz, 1895, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289; Adamson v. Gilliland, 1917, 242 U.S. 350, 353, 37 S.Ct. 169, 61 L.Ed. 356; Wittmayer v. United States, 9 Cir., 1941, 118 F. 2d 808, 810; Gates v. General Casualty Company of America, 9 Cir., 1941, 120 F. 2d 925, 927; Augustine v. Bowles, 9

Cir., 1945, 149 F. 2d 93, 96; and see 'Findings in the light of the Recent Amendments to the Federal Rules of Civil Procedure,' 8 F.R.D. 271, 289-291, and cases cited in the footnotes 6-9."

And in *United States v. Lambeth,* 9 Cir., 1949, 176 F. (2d) 810, it was said, at page 813:

> "On the evidence adduced, the trial judge found tha at all times here relevant appellee was not serving the public and was thus not furnishing a public performance for profit within the definition of the Federal taxing statute. The two witnesses for the Government failed to convince him otherwise and he ordered judgment for appellee in the amount of the refund, plus interest.
>
> On this record we think the case falls within Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. in part providing: 'Findings of fact shall not be set aside unless clearly erroneous, * * * ' Clear error calling for reversal is not present and the Government's presentation fails to convince us otherwise."

Tested by the foregoing rules, the record discloses ample evidence to support the two elements of voidable preference which formed the issues tried and the findings to that effect made by the trial Court against appellants.

**(a) The transfer was made while the debtor was insolvent.**

The trial Court made the following findings:

> "(3) That within four (4) months next preceding the filing of said involuntary petition in

bankruptcy on November 9, 1949, and more particularly on September 12, 1949, and in the District aforesaid, and while said bankrupt, Brick O'Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment to be issued and levied on property belonging to said Brick O'Gold, a corporation, bankrupt, * * *

(4) That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent." (T. 11-12.)

There is ample evidence in the record to support the finding that at the time the transfer was made the debtor was insolvent. The president of bankrupt corporation testified as follows:

"Q. Can you tell us, Mr. Loudolph, were you in active conduct of the corporation's business in September, 1949?

A. Yes, sir.

Q. Do you know what the assets and liabilities of the corporation consisted of?

A. Yes, sir.

Q. Can you tell the Court substantially what the assets were on September 12, 1949?

A. Well, the market value of the assets were approximately——

Mr. Berger. Just a moment. I will object to that, your Honor. The question was what were the assets, not what were the value of the assets.

The Court. What were the assets, and then you may value them. What did the assets consist of, real estate, personal property, manufacturing merchandise?

A. The assets consisted of plant and equipment, accounts receivable, notes receivable, very little cash, truck equipment. * * *'' (T. 22-23.)

* * * * * * *

"Q. Did the corporation own this equipment you speak of free and clear?

A. No, we had a chattel mortgage with the Pacific National Bank, San Francisco.

Q. And was that property subsequently sold by the bank?

A. Yes, they sold it.

Q. And what was the balance due and owing the bank at the time of the levy of this attachment on September 12, if you know?

A. $9,000, plus a small amount of interest, but the loan was $9,000.

Q. And what did the property bring upon sale?

A. $5999.99.

Q. $5999.99. Now, were all of the accounts receivable collectable on September 12, 1949?

A. No. One of our main troubles was that the accounts receivable were not collectable. The stores were not doing well.

Q. Now, you have set forth here under schedule A-3 the list of names, addresses and amounts of the unsecured creditors, is that correct? Will you take a look at the schedules which you signed?

A. This is a correct list of our creditors.

Q. And how much was owing at the time of the execution of the schedules?

The Court. That was in November?

Mr. Margolis. That is correct.

A. About $43,000 on these unsecured. I notice some salaries in here, might make that a little higher.

Q. Yes. Was the amount more or less on September 12, 1949?

A. No, it was approximately the same because we got—our situation became so bad that we had to pay cash for everything. We operated on a COD basis; everybody put us on a COD.

Q. Now, outside of the accounts receivable, did you have any other assets?

A. We had some notes on balance due of stores that was pledged to the Pacific National Bank along with the plant and equipment.

Q. Did you have any equity in those notes on September 12, 1949?

A. Yes, we had some equity—I don't know, because the bank still has the notes and they realized $6000, or $5999, and I don't know just how they came out on the balance. I know it made some settlements, but they were very low.

Q. Were all of the equity or value of the notes plus whatever could be recovered on the accounts receivable and any other assets you had sufficient to pay the general creditors?

A. No.

The Court. What were the accounts receivable as shown in the petition for bankruptcy? Aren't they set out in the assets.

Mr. Margolis. They are, Your Honor.

The Witness. I could give them at the time very closely but——

Q. (by Mr. Margolis). Look at schedule B-3. Probably not familiar with the caption, the witness isn't.

The Court. Yes, you find it for him.

Q. (by Mr. Margolis). The court wants to know what the accounts receivable were, Mr. Loudolph? You find them under schedule B-3.

A. They are in a total of approximately $13,-500, some cents.

Q. Did you have any other assets?

The Court. You say those accounts receivable were not very good, there were not a great many of them collectable?

The Witness. They weren't collectable because the stores were not making money. We gave this credit to hope for the better, which never happened. If we ever tried to collect these the stores would have to close.

Q. (by Mr. Margolis). Did you owe any taxes also, Mr. Loudolph?

A. Yes, sir.

Q. Will you look at schedule A-1 and tell how much in taxes you owed; schedule A-1 as set forth there?

A. $976.

Q. I notice also on the schedule A-4, signed by yourself as president of the Brick O'Gold, that there was an obligation to the Morris Plan in the sum of $14,866.

A. That is a contingent liability. The stores bought—when the people bought the stores they financed with the Morris Plan, some of them did. We went on the notes along with them as a contingent liability.

Q. And at the time of the attachments, September 12, 13, 1949, did you owe the Morris Plan any money?

A. Did we owe them besides this contingent liability?

Q. Yes.

A. We owed them a small amount, maybe $2000. It was covered by the truck equipment and automobile.

Q. I see.

Mr. Margolis. Now, I exhibit to counsel, Your Honor, the claims from the clerk's office being 31 in number.

The Court. Unsecured creditors?

Mr. Margolis. That is correct, Your Honor. I haven't run a total on them as yet, Your Honor. I just picked them up this morning. They represent the claims approved and allowed. Subject to checking, however, if Your Honor please, in that file of secured claims, which of course we have to leave out in our computation of the unsecured creditors for the purpose of having counsel examine the file so that I can exhibit it to the witness——

The Court. Can you state whether they are approximately the same as that shown in the petition schedules?

Mr. Margolis. Schedules—that, I don't know without checking, Your Honor. Often times in the matters creditors phone in to inquire what possible assets are in a certain case and won't go to the trouble or expense of a Notary fee to prepare a claim. These claims came into the clerk's office; there are 41. There may be one or

two more secured claims. There are, however, sufficient unsecured claims to my knowledge to establish the percentage theory which we allege is one of the elements and with which there is no dispute.

Mr. Berger. I don't know what he means by dispute, I don't know if it is a disputed fact. I haven't gone into the matter. I feel from our evidence we will prove that they were not even entered, and don't have any point in going into these claims, but I can't see—I don't dispute them; however, it is assumed I must dispute them. I don't know anything about them, I haven't seen them until now. However, to save the time of the Court, if the Court desires to admit them, giving me a chance later——

The Court. Yes, you may do that, and I should like, before we close the case to know the total, have a total run.

Mr. Margolis. I will undertake to do that, Your Honor, and I might add if counsel is correct in part, as we have stipulated at the beginning of the case, the only issues is the questions of insolvency of the corporation and the knowledge by the defendants and this attempt to offer these claims, merely information for the Court. However, if they are immaterial they will be disregarded. If Your Honor wishes to know the amount I will run a total and counsel can check it and I will offer it to the Court at the afternoon session.

The Court. After the noon recess give me a total.

Mr. Margolis. Yes.

Q. The schedules which you hold show indebtedness in excess of $40,000, the schedules you hold in your hands, unsecured creditors?

A. Yes, sir.

Q. And the assets which you have told us about comprise these accounts receivable, and you mentioned something about some personal property which was mortgaged, and did the corporation receive any equity out of the sale of that property?

A. No, sir, you mean the plant and the equipment?

Q. That is correct.

A. No, it did not.

The Court. On any real estate?

A. No, sir, it was all machinery and office equipment.

Q. (by Mr. Margolis). The corporation didn't own any real estate?

A. No, sir.

Q. No stocks or bonds?

A. No, sir.

Q. And did the condition of the corporation between September 12 and the date of the filing of the involuntary petition on November, I believe it was the 9th——

The Court. November 9th.

Q. November 9, get better or worse?

Mr. Berger. Just a moment. If Your Honor please, that certainly is calling for a conclusion unless some proof either by books or records, as to whether they got better or worse. Merely a statement, a bald statement without any foundation whatsoever—I will object to that statement.

Mr. Margolis. It seems to me if the witness was an active operator of the business, Your Honor, he would be one who would know whether the business improved or whether it didn't.

The Court. Ask him generally what the condition of the business was on September 12.

Mr. Berger. The point in issue, Your Honor, would be that in September of 1949, but not in November as to whether it changed or not, because the books themselves would disclose that.

The Court. He may state on September 12, 1949, what was the condition of the business, approximately what were the assets, liabilities and so forth.

Q. (by Mr. Margolis). Will you answer the question?

A. The situation of the corporation on September 12 was just about the same as it was in this.

Q. As set forth in the schedules?

A. Yes.

Mr. Berger. I move to strike out the answer as not responsive.

The Court. I will allow that in. He stated on November 12, what the condition was. He says as President of the corporation that on September 12 it was in approximately the same condition.

The Witness. I would say the only change was some labor. We weren't paying our labor in that period, and got slightly worse because of the labor, by buying everything on COD, on a COD basis.

The Court. Weren't paying your labor?

The Witness. No.

The Court. You mean you didn't keep up with your wages?

A. That is right, sir.

Q. (by Mr. Margolis). And why didn't you pay your labor?

A. We didn't have the money.

Q. Now, do you know Mr. Norberg who is sitting here in the Courtroom?

A. Yes, sir.

Q. And can you tell the Court when you first met Mr. Norberg?

A. I first met Mr. Norberg in what we call the Lakeside Store on Ocean Avenue.

Q. Could you tell us the date, approximately?

A. About the 8th of September.

Q. Of 1949?

A. 1949, right in there. It was a Saturday.

Q. Who was present at that meeting?

A. Mr. Norberg, Miss Lee, who is in the courtroom.

Q. She was an officer of the corporation?

A. Yes, sir.

Q. Yourself and Mr. Norberg?

A. Yes, sir.

Q. Can you tell the Court the reason for Mr. Norberg's visit or invitation to the Lakeside place of the bankrupt corporation?

A. I think——

The Court. Mr. Margolis, isn't it the rule of this Court that counsel stand?

Mr. Margolis. I beg your pardon; I am sorry.

Q. Go ahead.

A. Mr. Norberg phoned me in the morning. He said he wanted to have a talk with me, and I said, well, we could talk if he wanted to come up

on a Saturday afternoon. He said, I will come right up, and he came up and I had some facts and figures at my disposal there.

Q. Did he tell you what he wanted to come up about?

A. Told me he wanted to come up about KJBS indebtedness.

Q. Yes. And he came out to the place on Lakeside Street?

A. Yes.

Q. How long a time did he spend there?

A. Well, we had a long chat, probably half hour, twenty-five minutes, half hour.

Q. Can you tell the court what you said and what Mr. Norberg said in response to your statements and vice versa?

A. Mr. Norberg was very cooperative with me and we went over—I had a financial statement, I went over the financial statement and the conditions of the corporation with Mr. Norberg. I explained to him what our difficulties were, that we were seeking new capital and we had a couple of good prospects to come in with us and if the people we owed money to would go along with us we might be able to pull it out, but if we didn't we weren't to get any new capital we couldn't pay anyway. And Mr. Norberg was cooperative and I gave him all of the information that I had, explained the situation about the stores, they weren't doing well and although it looked like we had some accounts receivable some of them were uncollectable and that we were just in bad shape if we didn't get this new capital in.

Q. And what did Mr. Norberg say in response to your explaining to him what the situation was from this financial statement, if you can tell us?

A. Mr. Norberg didn't comment very much, more or less listened to what I was telling him.

Q. Yes. And was Miss Lee present at this conversation, or was she about the premises?

A. She was working in the store.

Q. She didn't hear anything that went on?

A. I don't know, but she wasn't active in the conference.

Q. What else was said by you to Mr. Norberg and by him to you at that time?

A. Well, the main theme of the conversation, as I was explaining to Mr. Norberg the serious condition of the corporation and the figures.

Q. Did you discuss with him the financial condition of the corporation at that time?

A. Yes, I had the financial statement with me.

Q. And did you go over it in detail, the items set forth in the financial statement?

A. Yes, we did, I went over with him——

Q. And what if anything did he say at the conclusion of that conference?

A. Well, the best of my knowledge he said he didn't know what he was going to do. My efforts with Mr. Norberg were to try and convince him that there was no value in starting an action, if he did something like that it would ruin our chances to get new capital, and there was no decision made by Mr. Norberg at that meeting.

Q. Did you discuss with him that you were having financial difficulties at that time?

A. Yes, we were definitely.

Q. And you told him all the details in connection with the business?

A. It was common knowledge. Even KJBS, his client, had been talking with us.

The Court. Yes, he could see what was coming.

Q. Yes. Just tell us, you stated to Mr. Norberg at that time with respect to the financial condition of the corporation and enumerated that it is common knowledge?

A. Yes, I went over it with great detail with Mr. Norberg.

Q. And he left after you had about a half hour's conference?

A. Yes.

Q. Within a few days this attachment suit was brought?

A. Yes.

Q. Did you have any discussions or conferences with Mr. Norberg after the attachment?

A. Yes, Mr. Norberg closed up two of our stores. He worked closely with a Mr. Kolb.

Mr. Berger. I move to strike the answer as not responsive to the question, any other conferences with Mr. Norberg after that time, only confine himself to the question.

The Court. I don't think—he says that he closed the stores by this attachment and worked through Mr. Kolb, the attorney." (T. 24-34.)

* * * * * * *

"Q. Who is Mr. Kolb? He is an attorney?

A. He is an attorney.

Q. Representing a creditor?

A. Yes, Pacific Mechanical and Electrical Company.

Q. What?

A. Pacific Mechanical and Electrical Company.

Q. One of the creditors listed in the schedules?

A. Yes, sir." (T. 35.)

* * * * * * *

A. Mr. Norberg didn't comment very much, more or less listened to what I was telling him.

Q. Yes. And was Miss Lee present at this conversation, or was she about the premises?

A. She was working in the store.

Q. She didn't hear anything that went on?

A. I don't know, but she wasn't active in the conference.

Q. What else was said by you to Mr. Norberg and by him to you at that time?

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A. He is an attorney.

Q. Representing a creditor?

A. Yes, Pacific Mechanical and Electrical Company.

Q. What?

A. Pacific Mechanical and Electrical Company.

Q. One of the creditors listed in the schedules?

A. Yes, sir." (T. 35.)

* * * * * * *

On cross-examination this witness testified:

"Q. Now, the list of unsecured creditors that you had, that you talked about, was that the same list that was unsecured in October, in September of 1949, or November, which? Do you know offhand, or without referring to your books?

A. The list was primarily, it was the same with the exception of an accounting bill that was to come in, and an attorney bill that was to come in and some additions in labor. Aside from that it was the same.

Q. Yes. When did you go on a C.O.D. basis, Mr. Loudolph, with the various creditors that you had?

A. Sometime in August.

Q. In August. Up to that time——

A. We put our stores on a C.O.D. basis and then we paid on a C.O.D. basis. We didn't give the store any more credit.

Q. Then you were on a C.O.D. basis with your creditors?

A. Yes, sir.

Q. When was that?

A. In August.

Q. You did that voluntarily?

A. No, began to get behind.

Q. Yes.

A. Only way we could get our materials.

Q. Now, you stated that your liabilities were the same, approximately the same in September as in November?

A. Yes, sir.

Q. And that with the exception that you didn't pay for the salaries in November?

A. Yes, and the exception that we had, that accounting bill still due and the attorney work.

Q. And didn't you——

A. Some smaller ones.

Q. Didn't you withdraw from your cash fund the same amount of money, at least don't your books show that you withdrew from your account fund the amount of the salaries you should have been paying to the employees?

A. Stopped salaries in July, took no salaries, the offices took no salaries after July.

Q. The salaries you referred to were the officer's salaries?

A. No.

Q. What were the salaries you were referring to?

A. I am referring to the driver and the girl in the office.

Q. Was the driver a member of the corporation?

A. No, sir.

Q. Was the girl in the office?

A. No, sir.

Q. Did they get paid since July?

A. Small amounts, but there is still a balance owing to them.

Q. And you did not deduct that, the amount of monies due them, those two only, from your cash fund?

A. No, we paid them as we could, gave them sometimes, gave them $50 on account of their salary, paid as we could and when we had to close we owed them approximately $400 each.

Q. Coming back to the conversation that you first had with Mr. Norberg when he called upon you in September, you showed him the financial statement at that time, did you?

A. Yes, sir.

Q. You are positive of that?

A. I am, I had it right there.

Q. And did you go over it thoroughly with him?

A. Yes, sir.

Q. Did you tell him at all that you were expecting new capital to come in?

A. Yes, sir.

Q. And did you tell him where you were going to get new capital?

A. I don't know. We were working with a man named Pate.

Q. He was a man who used to call on you and he was anxious to come in with you?

A. The main reason I brought up that with Mr. Norberg, I told him he would make our chances very slight if an action was put on at this time.

Q. Slight for what?

A. To get additional capital that would put us on our feet.

Q. Did you mention anything at all about getting a loan from R.F.C.?

A. Yes, sir, we were working with our R.F.C. —probably came out in the conversation.

Q. Probably did—what happened?

A. We didn't get it.

Q. Did you make application for it?

A. Yes, an application in the sense that I had about four conferences—they don't take applications in the R.F.C. unless it is going to go through, but they talk with you. I had the Pacific National Bank introduce me, but I had

quite a few conferences with the R.F.C. but they didn't think that it was worth while to put in an application.

Q. In other words, your business was too small for them to invest in?

A. I don't think it was a matter of size, it was just that the statement didn't look good enough.

Q. Is that the same financial statement you are talking about?

A. Yes, sir.

Q. The same one you showed to them?

A. Yes, sir. (T. 47-50.)

This testimony plainly measures up to the definition of "insolvent" contained in Section 1(15) of the Bankruptcy Act (11 U.S.C.A., Sec. 1(15).)

**(b) The transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.**

In the previously quoted finding (4) the trial Court found "That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent." (T. 12.)

The issue of "reasonable cause" was essentially one of fact for the trial Court as the trier of fact, including the facts proved and all reasonable infer-

ences that might be drawn therefrom, and as there was substantial evidence to support his findings on the subject they must be accepted as conclusive on appeal. (*Kaufman v. Tredway,* 105 U.S. 271, 25 S. Ct. 33, 49 L. Ed. 190; *Pyle v. Texas Transport etc. Co.,* 238 U.S. 90, 35 S. Ct. 667, 59 L. Ed. 1215; *Remington on Bankruptcy,* Vol. 4-A, Sec. 1707.) That the trial Court as the trier of fact had broad power to sift the evidence and determine the credibility of the witnesses who appeared before him, is undeniable. (*Quock Ting v. United States,* 140 U.S. 417, 420-1, 11 S. Ct. 733, 734-5, 35 L. Ed. 501, 502.)

The secretary of bankrupt corporation gave this testimony:

"Q. And you knew that the amount of this claim that Mr. Norberg came out to collect, as you have told us, was past due for some time?

A. Yes.

Q. Will you tell the Court substantially what occurred in that meeting when he came out; what you said to him and what he said to you?

A. Well, he asked me about the condition, the financial condition of the company. I told him that we were in financial difficulties, we didn't have the money, wanted to pay our creditors, but weren't able to. So he said what do you want us to do about it? I told him at the present time we were working very hard with a number of parties seeking additional capital.

Q. Yes; did he ask you any questions?

A. He asked also if they were the only ones we owed money to. I said no, there were nu-

merous ones. He also asked if they were the largest or the smallest, and I said we had many larger and many smaller. And he asked how we intended to take care of our obligations, and I felt that we were really in a very serious condition, didn't have the money to pay them and we were working, trying to get additional capital.

Q. You told him that?

A. Yes.

Q. What did he say?

A. He seemed to be very conscientious and asked what other assets we had, whether we had stores that owed the company any money or not, and I said yes, they did, because I for myself owed money, the Lakeside, and I know I owed money, but I couldn't pay because we were just starting the business and we were overly hopeful and we just kept getting behind.

Q. You had a franchise from the corporation and you were operating the store?

A. The Lakeside store was mine.

Q. This conversation took place——

A. The first conversation when I met him, yes.

Q. Anything else said at that time by you and by Mr. Norberg, and if so, tell it to the Court.

A. He asked whether there were other creditors. I said there were, so he said what do you intend to do about that and I said we had to get additional capital and then would give them a certain payment and the rest have to be on a payment plan. He said he wasn't interested in other companies, interested in his own, just collecting for his one client.

Q. How long did this conversation take place?

A. There were interruptions, because I was working at the store myself and when the customers came in I had to stop, but I would say the conversation, I would say that he was there for at least twenty minutes." (T. 116-118.)

Appellants urge that the witness, Mr. Theodore A. Kolb, an attorney at law, whom they produced, and "who had some dealings with defendant corporation after the attachment was levied and before the petition in bankruptcy was filed" (App. Op. Bf. p. 3), testified to certain conversations which occurred "after the attachment had been issued and levy made" (App. Op. Bf. p. 3). The evidence referred to by appellants was produced by them.

Appellants' contention that Mr. Kolb "had some dealings with defendant corporation" (we assume what is meant, is bankrupt, and not defendant) "after the attachment was levied" is misleading and not in accordance with the record. The witness had dealings with bankrupt corporation more than sixty (60) days "prior" to the transfer in question, namely, correspondence between the witness who represents Pacific Electrical and Mechanical Company, a creditor of bankrupt, and the bankrupt, attempting to collect a claim against bankrupt and the filing of a suit to enforce this claim on August 2, 1949, more than forty (40) days prior to the transfer in question. (T. 69-75.) The witness at this time knew that the bankrupt corporation was defendant in a suit brought by an accounting firm for

the recovery of $5,000.00 (T. 82), not $500.00, as perhaps inadvertently mentioned by appellants (App. Op. Bf. 4). The witness further testified that his clients insisted he proceed to judgment on the suit brought on their behalf on August 2, 1949, "but would hold off execution if satisfactory arrangements are made."

"The Court. What do you mean by satisfactory arrangements?

The Witness. Payment of security.

The Court. Payment of security?

The Witness. Or his situation work itself out in such a way they could see their way clear of certainty of payment.

Q. Go ahead.

A. Especially keeping in mind it takes some time to obtain a judgment in the event that the discussions at that time would not culminate in satisfactory arrangements. So we proceeded—as a matter of fact, I remember the attorney for Mr. Loudolph and Brick O'Gold Corporation stipulated to a judgment in the matter. He felt it was useless to enter an answer in the matter and a judgment was entered.

Mr. Margolis. I move what he felt be stricken, Your Honor.

The Court. Well, I will strike out what he felt. As a matter of fact, as a result of your conferences with your client you both allowed your account to ripen into a judgment?

The Witness. That is correct.

The Court. Not satisfied with the situation?

The Witness. Weren't satisfied, largely because Mr. Loudolph's slowness in answering com-

munications and inability of getting a hold of him, and the fact he made appointments and didn't keep them quite frequently. Our clients felt they wanted to have something stronger than just Mr. Loudolph's word. He made promises and didn't keep them, however, whenever he did appear.

The Court. Isn't an unusual course, a debtor corporation trying to keep his head above water.

The Witness. It is the usual situation if you are short of cash.

The Court. You mean your clients weren't satisfied with the efforts and wanted either cash money, security, or a judgment, isn't that correct?

The Witness. That is correct. We weren't satisfied with the efforts on the part of Mr. Loudolph, and our clients wanted Miss Lee in the picture and rather have her run the show than Mr. Loudolph, because from certain checks that they had made on the situation they weren't satisfied with Mr. Loudolph's management of the corporation, they wanted Miss Lee to take over and felt the only way to do that would be if Miss Lee was in active control of the business, not Mr. Loudolph.

Q. You mentioned that judgment was stipulated to?

A. That is correct, judgment stipulated to. When the attorney for Brick O'Gold assigned a stipulation and judgment entered upon the stipulation, he stated that he had no defense to the action and it was useless for him to enter an answer in the matter, so stipulated to judgment and judgment was entered.

> Mr. Margolis. May I interrupt, please? Do you have the stipulation, sir, on the judgment? All of those matters become important, as I will demonstrate a little later, and like to get the chronology here, Your Honor." (T. 82-84.)

With respect to the testimony of this witness relating to conferences and conversations at his office "subsequent" to September 12, 1949, the date of the transfer in question—this evidence was likewise produced by appellants. Accordingly, appellee's case does not in any sense depend upon this testimony of the witness, Mr. Kolb, and furthermore the trial Court was under no obligation to either believe or consider this testimony. With respect to the testimony of this witness concerning events "prior" to the date of the transfer, since appellants offered this testimony, it is respectfully submitted, they are bound by it. Hence, where the District Court finds an issue against an appellant, the Appellate Court will consider only the evidence which will support the trial Court's judgment. (*Knoblick v. Temple,* 7 Cir., 1947, 159 F. (2d) 197.)

Appellant Norberg, on cross-examination, testified he was a member of Central Credit Reporting Bureau, that is owned by several collection agencies; that his office number with that agency is 21; that the agency supplies its members with information regarding pending suits against a debtor; that immediately upon receipt of an account for collection it is sent to the bureau and in return within three or four days the sender gets back the information

indicating any suits which are pending against a debtor; that presuming the claim concerning the instant controversy went to the bureau on Friday, September 9, 1949, the information requested would be received within three or four days. (T. 165-168.) This information, which is set forth and attached to what is designated as a "suit card," Appellee's Exhibit No. 6, and consisting of three cards, reveals the suit brought by the witness Mr. Kolb for his client on August 2, 1949 for $1,401.00, another on August 8, 1949 for rent in the amount of $1,200.00, and a third on August 20, 1949 for $334.00 for money. In addition there are two additional suits, subsequent to September 12, 1949, with which we are not concerned.

Section 60 of the Bankruptcy Act (11 U.S.C.A., Sec. 96) does not require that a creditor have actual knowledge that his debtor is insolvent, and subdivision (b) thereof specifically provides that a preference may be avoided if the creditor "or his agent acting with reference thereto" has reasonable cause to believe that the debtor is insolvent. And it is a general rule that "notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose." (*Grandison v. National Bank of Commerce,* 2 Cir., 1916, 231 F. 800, 809; *Security-First Nat. Bank of Los Angeles v. Quittner,* 9 Cir., 1949, 176 F. (2d) 997, 1000.)

In view of the circumstances disclosed by the testimony quoted under this subdivision it certainly cannot be said that the findings to the effect that the transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent are "clearly erroneous."

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2. THE CONTENTION THAT THE JUDGMENT FIXED THE VALUE OF BANKRUPT'S ASSETS AT THE TIME OF THE ADJUDICATION INSTEAD OF AT THE TIME OF THE PREFERENCE IS WITHOUT MERIT.

The record discloses bankruptcy intervened upon the filing of an involuntary petition on November 9, 1949, on which the order of adjudication was made and entered on November 28, 1949. (Exhibit No. 5.) In the previously quoted finding (3) the trial Court found "That within four (4) months next preceding the filing of said involuntary petition in bankruptcy on November 9, 1949, and more particularly on September 12, 1949, and in the District aforesaid, and while said bankrupt, Brick O'Gold, a corporation, was then and there insolvent, defendants caused a writ of attachment to be issued and levied on property belonging to said Brick O'Gold, a corporation, bankrupt, * * *" (T. 11.) It is obvious that no mention is made of the date of adjudication. Similarly, finding (4) wherein the trial Court found "That at the time of the levy of the writ of attachment on September 12, 1949, defendants and each of them had reasonable cause to believe that the

enforcement of the levy of attachment would effect a preference and that defendants and each of them, at the time of said levy and at all times thereafter, had reasonable cause to know that bankrupt corporation was then and there insolvent." (T. 12), is devoid of any reference to the date of adjudication.

In speaking of the time of evaluating a debtor's assets, it was said in *Palmer Clay Products Co. v. Brown*, 1935, 297 U.S. 227, 228, 56 S. Ct. 450, 451, 80 L. Ed. 657:

> "Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but the actual effect of the payment as determined when bankruptcy results."

Under somewhat similar circumstances the foregoing holding was followed by the Seventh Circuit, in *Canright v. General Finance Corporation,* 1941, 123 F. (2d) 98, 100.

Appellants complain that appellee did not sustain the burden of proving that "the person receiving the payment or to be benefited thereby had reasonable cause to believe that it was thereby *intended to be given a preference.*" (App. Op. Bf. 16.) The holding upon which appellants rely is from a decision of the Fifth Circuit in 1908. This is not the law, for since 1910, the "debtor's actual intent" has not been an essential element in the determination of

a preference. (*Collier on Bankruptcy,* 14th Edition, Vol. 3, 769; *Richardson v. Germania Bank of City of New York,* 2 Cir., 1919, 263 F. 320, 322.)

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3. THE SUBSTANTIAL RIGHTS OF THE APPELLANTS WERE NOT AFFECTED BY THE INTRODUCTION OF THE BANKRUPTCY SCHEDULES.

Appellants' "point" captioned, "The Bankruptcy Schedules Were Improperly Admitted In Evidence" (App. Op. Bf. p. 17) concerning the introduction of the file of the bankruptcy proceedings, including the bankrupt's schedules, is prefaced by the alien statement, "Obviously an objection to the introduction of said schedule would have been of no avail." (App. Op. Bf. p. 6.) No point of that character is suggested in the "Concise Statement of Points" relied upon by appellants, and filed by appellants under Rule 19, subdivision 6, of this Court. (T. 212-213.) Reply to this alien statement is therefore unnecessary.

The "point" consists in a quotation from *Remington on Bankruptcy,* 4th Ed., Section 2260, to the effect that "the schedules of the bankrupt are inadmissible against a transferee," and the quotation from a case there cited in support of the text. (App. Op. Bf. p. 17.) The concluding section of Remington's said Section 2260 is omitted by appellants. It reads:

> "But due objection to their admission must be made at the time, else the objection is waived."

And said concluding sentence is fully supported by the case there cited, to-wit, *Olsey v. Adams,* 5 Cir., 268 F. 114, 116.

The manner in which appellants present the foregoing "point" demonstrates the advisability of requiring strict observance of Rule 20, subdivision 2(d), of this Court concerning specification of error. Observance of the rule would have required appellants to "quote the grounds urged at the trial for the objection and the full substance of the evidence admitted." When reference is made to the record it will be found that not only was no objection made to the introduction of this evidence, but appellants sought and obtained information therefrom. (T. 135.)

Finally appellants cross-examined an officer of bankrupt corporation in connection with part of the bankruptcy records of which the schedules were a part, as well as the schedules. (T. 43-44, 55-56, 59.) It therefore follows that even if it be assumed that the trial Court should not have admitted the schedules, it cannot be said that any substantial rights of the appellants were thereby affected.

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4. **THE JUDGMENT OF THE TRIAL COURT WAS SOUND IN LAW AND SOUND IN FACT AND THEREFORE SHOULD BE AFFIRMED.**

It was said in *In re Penfield Distilling Co.,* 6 Cir., 1942, 132 F. (2d) 694, at page 694:

> "Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed

by the district judge, will not be set aside, on appeal on anything less than a demonstration of plain mistake."

In *Security-First National Bank of Los Angeles v. Quittner,* 9 Cir., 1949, 176 F. (2d) 997, it was said at page 999:

"But where the evidence is such that different conclusions are warranted, the determination of the question here involved is essentially one for the trial court. For even where there is no doubt or controversy as to what facts came to the attention of the creditor, the question as to whether he acted reasonably in making no further inquiries, in short, whether he had reasonable cause to believe the debtor insolvent, is generally a question of fact."

And in *Goldstein v. Polakof,* 9 Cir., 1943, 135 F. (2d) 45, where the Court stated at page 45:

"Recitation of the evidence follows in the brief and we have given it close attention. There is, however, nothing before us but a request that we try the case de novo on the record. It is true that appellant states in each of his 'Specifications of Errors' as to the court's findings that 'the finding * * * is against the weight of and not supported by the substantial evidence.' But in each instance the issue turns upon the trial court's conclusion from substantial documentary evidence together with highly conflicting testimony of witnesses relating thereto.

Suffice it to say that, applying Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, in giving '* * * due regard * * * to

the opportunity of the trial court to judge of the credibility of the witnesses.', we do not find the trial court's findings of fact 'clearly erroneous.' ''

On the record, it is clear that the judgment of the District Court is sound in law and sound in fact, and appellee therefore respectfully submits that the judgment should be affirmed.

Dated, San Francisco, California,
August 8, 1951.

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